APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-50173

BERNARD M. PEREZ, on behalf of himself and all others similarly situated,
Plaintiff,

and

FERNANDO E. MATA,
Movant-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; EDWIN MEESE, Attorney General, WILLIAM S. SESSIONS, Director, Federal Bureau of Investigation,
Defendants-Appellees,

and

WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation,
Defendant.

Appeal from the United States District Court for the Western District of Texas

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Dec. 13, 1995

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Movant-Appellant Fernando E. Mata, a former employee of the Federal Bureau of Investigation (FBI), appeals the district court's order dismissing, for lack of jurisdiction, Mata's motion seeking relief under Title VII [1] on grounds of retaliation for his participation, on behalf of present and former Hispanic employees, in the instant class action lawsuit against the FBI.[2] In that suit, the district court found no retaliation against any class member other than the named plaintiff, Bernardo Perez.[3]

Mata alleged that, in violation of § 704 of Title VII,[4] the FBI took acts of retaliation against him by revoking his top-secret security clearance and firing him. Employment like Mata's with the FBI requires top-secret security clearance, so the FBI's revocation of Mata's clearance was tantamount to firing him because his eligibilty to serve terminated automatically as a result of the loss of that clearance. In response to Mata's allegations that the revocation of his clearance and resulting firing were retaliatory, the FBI proffered, as non-discriminatory reasons for such adverse employment actions, that Mata (1) fabricated official reports, and (2) disclosed classified information to unauthorized representatives of the Cuban Government. In the ordinary Title VII situation, that would put the ball in Mata's court to show pretext.

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[1] 42 U.S.C. § 2000e, et seq.

[2] *See Perez v. FBI* 707 F.Supp. 891 (W.D.Tex.1988) (liability phase); *see also Perez v. FBI* 714 F.Supp. 1414 (W.D.Tex.1989) (recovery phase).

[3] *Perez*, 707 F.Supp. at 926.

[4] 42 U.S.C. § 2000e-3(a).

Observing that the essence of the retaliation asserted by Mata is the FBI's decision to revoke his security clearance, the district court concluded that it lacked subject matter jurisdiction to review his claim and entered an order of dismissal. It is that order of the district court which is appealed herein by Mata.

Although we understand and sympathize with Mata's frustration at not being able to obtain *judicial* review of his retaliation claims, we come inevitably to the same conclusion reached by the district court: Because the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance,[5] any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision.[6] As the Supreme Court and several circuit

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[5] *See Brazil v. U.S. Dept. of the Navy*, 66 F.3d 193 (9th Cir. 1995) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

[6] We also understand the concern of federal agents, whose employment is conditioned on security clearances, that the lack of judicial review creates the potential for abuse by the agencies and bureaus employing them. This result, however, is required by the fact that security clearance determinations are "sensitive and inherently discretionary" exercises, entrusted by law to the Executive. *Department of Navy v. Egan*, 484 U.S. at 518, 527-29, 108 S.Ct. 818, 823-25, 98 L.Ed.2d 918 "Predictive judgments of this kind" properly are left to "those with the necessary expertise in protecting [the sensitive material,]" rather than in the hands of "an outside nonexpert body" or the equally nonexpert federal courts. *Id.* at 529, 108 S.Ct. at 825; *see also Webster v. Doe*, 486 U.S. 592, 601, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988) ("[T]he [Central Intelligence] Agency's efficacy, and therefore the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees . . . . [E]mployment with the Agency entails a high degree of trust that is perhaps unmatched in Government service."). Accordingly, review of these decisions is left to the respective departments of the Executive Branch, which have internal administrative procedures in place for adjudicating employee complaints of discrimination and ap-

courts have held that such scrutiny is an impermissible intrusion by the Judicial Branch into the authority of the Executive Branch over matters of national security, neither we nor the district court have jurisdiction to consider those matters.[7]

In addition to concluding that it lacked subject matter jurisdiction to address Mata's Title VII claim, the district court also determined that it lacked such jurisdiction to address Mata's *Bivens* claims under the First and Fifth Amendments. In so doing, the court correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides both the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination.[8]

In sum, our review of the evidence and the applicable law convinces us that the determinations of the district court are free of reversible error. We are led, therefore, to the unavoidable conclusion that neither the district court nor this court on appeal has subject matter jurisdiction to consider Mata's Title VII or *Bivens* claims. The rulings of the district court regarding Mata's motion are, therefore,

AFFIRMED.

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peals therefrom. We must stress, therefore, that the Executive Department—in this instance, the Attorney General, the Department of Justice, the Director of the FBI, and the Inspector General—bears a heavy responsibility and special duty of fairness to ensure that its agencies and bureaus do not trample the rights of their employees in employment matters.

[7] *See e.g., Department of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988); *see also Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988).

[8] *See Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (Title VII provides exclusive judicial remedy for claims of discrimination in federal employment); *Porter v. Adams*, 639 F.2d 273 (5th Cir.1981).

APPENDIX B

[Filed Feb. 8, 1995]

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-87-CA-10

BERNARDO M. PEREZ

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FERNANDO E. MATA

BEFORE THE COURT, in the above-captioned cause of action, are two motions by Plaintiff and *Perez* class member Fernando E. Mata [hereinafter Mata]: The "Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel, and for Relief from Retaliation" filed June 4, 1992, and The "Motion to Prohibit Further Retaliation and the Instigation of Death Threats" filed October 8, 1993. Also before the Court are two replies by the Federal Bureau of Investigation [hereinafter FBI]: "Defendant's Opposition to Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel and for Relief from Retaliation" filed August 3, 1992, and "Defendant's Supplemental Pleading in Response to Reply Memorandum of Fernando E. Mata" filed October 22, 1992. On the outset, let it be known that the Court does not usually allow motions such as these to go unanswered

for a period of years; nevertheless, the Court held a hearing on January 17, 1995, in El Paso, Texas. The attorneys for both parties eloquently argued their positions and the Court has rendered a decision.

On August 15, 1988, the *Perez* class members came before the Court alleging the FBI violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Court held the FBI violated Title VII when they failed to give Hispanic agents proper credit for their contributions, and consequently excluded the agents from promotions and benefits. *Perez v. Federal Bureau of Investigation*, 707 F.Supp. 891 (W.D. Tex. 1988).

In that decision, the Court set out the standard for § 704 retaliation against employees who have "opposed any practice made an unlawful employment practice by this subchapter" or against employees who have "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[1] 42 U.S.C. § 2000e-3(a). Mata claims to have been the victim of § 704 retaliation and now asks the Court to make a determination based upon his documented facts. Because Mata's alleged retaliation was in the form of a revocation of his top-secret security clearance and termination of employment,[2] the Court must first address whether federal courts lack judisdiction to review the merits of a security clearance revovation.

Law Applicable

In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that the Merit Systems Protection Board [hereinafter MSPB] had no authority to

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[1] *Perez*, 707 F.Supp. at 922 (therefore, the Court will not re-examine the law applicable under § 704).

[2] All positions with the FBI require a top-secret security clearance. Thus, when the FBI revoked Mata's security clearance, he was no longer eligible to be an employee and was terminated.

review an executive decision to revoke a security clearance. The Navy discharged Egan from his position as an employee when they denied his bid for a security clearance based upon the failure to disclose prior convictions and admitted alcohol abuse. The *Egan* Court made several conclusions throughout the opinion regarding security clearances. First, the Court stated the strong presumption in favor of appellate review of agency decision making found in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), is not without limit "and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Egan* 484 U.S. at 526-27. Second, the Court stated "no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Id.* at 528. Third, the Court concluded that "unless Congress specifically has provided oherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

The real problem faced by this Court has been the lack of Fifth Circuit law, after *Egan,* addressing the jurisdictional issue. At lease three Circuit Courts[3] have addressed the issue, and all three have interpreted *Egan* to give Executive decision making the broadest possible power to preclude judicial review.[4] Nevertheless, the Supreme Court in *Webster v. Doe,* 486 U.S. 592 (1988),

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[3] *Hill v. Department of Air Force,* 844 F.2d 1407 (10th Cir. 1988); *Dorfmont v. Brown,* 913 F.2d 1399 (9th Cir. 1990); and *Guillot v. Garrett,* 970 F.2d 1320 (4th Cir. 1992).

[4] Such is the case despite the Supreme Court's statement in *Egan* that "[t]he *narrow question presented* by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance . . . ." 484 U.S. at 520 (emphasis supplied).

confirmed the lack of jurisdiction in federal courts to review the merits of security clearance determinations. *Webster* dealt with an employee of the Central Intelligence Agency [hereinafter CIA] allegedly terminated from his employment because he informed a CIA security officer that he was a homosexual. After extensive questioning and various internal reports lasting approximately six months, the CIA Director terminated the respondent pursuant to the National Security Act. The Supreme Court held that the Director's decision to terminate the respondent was not subject to judicial review under the Administrative Procedure Act; however, the Court held the respondent's constitutional claims were judicially reviewable. *Id.* at 601 & 603-04. Thus, both the FBI and Mata use *Webster* in their pleadings for its duality—judicial review prohibited under congressional acts dealing with national security; judicial review allowed under constitutional challenges despite national security.

Mata argues the Northern District of California case, *Buttino v. FBI*, 801 F.Supp. 298 (N.D. Cal. 1992), is controlling here. *Buttino* utilized that portion of the *Webster* decision holding a constitutional challenge, such as a violation of equal protection, to be judicially reviewable and not absolutely barred. *Buttino*, 801 F.Supp. at 302 & n.6. Similarly, Mata cites *Dubbs v. CIA*, 769 F. Supp. 1113 (N.D. Cal. 1990), for the same proposition that equal protection challenges to security clearance determination are judicially reviewable. The Court does not challenge the decisions cited by Mata that correctly construe *Webster* in equal protection contexts; nevertheless, there is a fundamental difference between a constitutional challenge (equal protection) and a statutory challenge (Title VII) to security clearance determinations.

In Mata's Reply Memorandum of September 4, 1992 and again at the hearing on January 17, 1995, Counsel alluded to the applicability of constitutional analysis to Mata's case. The Court is aware of the dearth of prece-

dent that pertains to Mata's particular case scenario. Moreover, the Court recognizes the parallels Counsel is attempting to draw out between violations of equal protection found in *Buttino* and in *Dubbs*, and those of alleged racial discrimination found in Mata's case; nevertheless, Mata's alleged § 704 retaliation does fall under Title VII and thus Title VII is the sole vehicle for relief. In *Brown v. General Services Administration*, 425 U.S. 820 (1976), the Supreme Court addressed whether § 717 of the Civil Rights Act of 1964 is the exclusive judicial remedy for claims of discrimination in federal employment. The holding was a resounding "yes." *Id.* at 835. Furthermore, in the Fifth Circuit case, *Porter v. Adams*, 639 F.2d 273 (5th Cir. 1981), the Court stated that appellant could not raise a constitutional claim under the Fifth Amendment and simultaneously raise a Title VII violation:

> Because we conclude that § 717 bars reprisals against federal employees who file charges of discrimination, appellant must bring her action under that section. Even if, as appellant contends, the Fifth Amendment would have afforded her a Bivens claim action for those reprisals prior to the enactment of § 717, such an action is no longer available because § 717 is now the exclusive remedy for charges of discrimination brought against federal employers. Brown v. GSA, 425 U.S. at 835 . . . .

Id. at 278.

The Court concedes there has never been a direct challenge, either successful or not successful, to a security clearance via Title VII. The Fourth Circuit in *Jamil v. Department of Defense*, faced such a challenge by appellant, yet expressly found "Whistleblowing" not to be an actionable claim under Title VII. 910 F.2d 1203, 1207 (4th Cir. 1990). The *Jamil* Court did express what would have been required of the appellant under the *McDonnell Douglas* inquiry to show that an employer's ex-

planation was a mere pretext for discrimination. *Jamil* 910 F.2d at 1208 (referencing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). Yet, conceded "[w]hether we would be permitted to do so, in light of Egan, is a question which we need not decide since . . . Jamil has not met his burden . . . ." *Id.*

In the later Fourth Circuit case of *Guillot,* the Court faced an argument challenging *Egan*'s apparent narrow holding. *Guillot* dealt with a civilian computer specialist denied a security clearance because he failed to disclose his alcohol and cocaine addition. The appellant claimed the United States Navy violated the Rehabilitation Act of 1973 due to his "disability" of alcohol and drug addiction. The appellant attempted to distinguish *Egan*'s holding that the MSPB had no authority to review an executive decision to revoke a security clearance pursuant to 5 U.S.C. § 7513, by stating " 'the express Congressional intent under the Civil Rights Act of 1964 (the enforcement vehicle for Rehabilitation Act violations)' provides for 'court scrutiny of a security clearance decision where a prima facie case of discrimination has been pled.' " *Id.* at 1325. The *Guillot* Court agreed that *Egan* only addressed the narrow issue of reviewability under § 7513, but continued in its analysis of Executive security clearance decisions by stating:

> We can discern, however, no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal. . . .
>
> Certainly, Congress has not "specifically provided" in any of these provisions [§ 505 of the Rehabilitation Act & § 717 of the Civil Rights Act of 1964], for either MSPB or judicial review . . . .
>
> Nor do any of these prvisions otherwise evidence the kind of unmistakable expression of purpose that the

> Supreme Court by necessary implication suggested in Egan would be required to support a conclusion that Congress intended to subject the Executive's security clearance determinations to scrutiny for violations of either 501 of the Rehabilitation Act of 1973 or Title VII itself.

Id.

The Court continued its analysis of the Civil Rights Act of 1964 by exploring its legislative history to find any indication of whether Congress intended to provide through the Act an administrative or judicial review of Executive security clearance decisions. In a particularly germane passage, the *Gulliot* Court quoted a portion of the legislative history that stated:

> In providing the statutory basis for such an appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under, statute for national security reasons in the interest of the United States.

Id. (citing H. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2185). Therefore, the Court is convinced the delineation by the Supreme Court in *Webster* and furthered by *Guillot* is the correct path in which to proceed. The safeguards remain for both sides—between statutes created by Congress that are *not* judicially reviewable within the national security context; and violations of constitutional guarantees that *are* reviewable and protect the fundamental rights of our citizens. *Cf. Webster v. Doe*, 486 U.S. at 2062-63 (Scalia, J., dissenting) ("Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent. . . . The documents needed will make interesting reading for district judges (and perhaps others) throughout the country.").

Accordingly, the Court shall not review the pertient facts of Mata's revocation of security clearance or determine the merits of the decision by the FBI for doing so. The Court lacks subject matter jurisdiction in the matter.

IT IS THEREFORE ORDERED the Motion of Fernando E. Mata to Appear Before Rightful Place Seniority Panel and for Relief from Retaliation is hereby DISMISSED for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED Fernando E. Mata's Motion to Prohibit Further Retaliation and the Instigation of Death Threats is hereby DISMISSED for lack of subject matter jurisdiction.

SIGNED this 6th day of February 1995.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
Senior District Judge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

I

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III

Title 42 U.S.C. § 2000e-2 provides in pertinent part:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, or for an employment agency to fail to refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

* * * *

IV

Title 42 U.S.C. § 2000e-3 provides in pertinent part:

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency,

or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * *

V

Title 42 U.S.C. § 2000e-16 provides in pertinent part:

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * *

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsec-

tion (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or atfer one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * * *

APPENDIX D

Excerpts from Transcript of Hearing Before the United States District Court for the District of Columbia, in *Doe v. Casey*, Civil Action No. 82-2016 (Feb. 25, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE,

Plaintiff

v.

WILLIAM CASEY,

Defendant

Washington, D.C. Friday, February 25, 1983

The above-entitled action came for hearing on cross-motions for summary judgment before the Honorable BARRINGTON D. PARKER, United States District Court Judge, in Courtroom No. 19, commencing approximately 11:00 o'clock, a.m.

PROCEEDINGS

THE DEPUTY MARSHAL: Remain seated and come to order.

This Honorable Court is again in session.

THE DEPUTY CLERK: John Doe v. William Casey, Civil Action 82-2016.

Mr. Lynch and Miss Shaffer represent the plaintiff. Mr. White, Mr. Burke and Mr. Jaksetic represent the defendant.

THE COURT: Cross-motions of summary judgment?

MR. WHITE: That is correct, Your Honor.

MR. LYNCH: Yes, Your Honor.

THE COURT: Who filed earlier?

MR. LYNCH: We filed the first motion for summary judgment. The Government has a motion to dismiss as well, but we filed the first, yes.

THE COURT: Counsel, come to the lectern.

MR. WHITE: Yes, Your Honor.

The COURT: What is the theory of the motion to dismiss?

MR. WHITE: Your Honor, my name is David White.

THE COURT: I am sorry?

MR. WHITE: Department of Justice. We have basically four theories, Your Honor.

* * * *

[4] We further argue that plaintiff has failed to state a claim upon which relief may be granted inasmuch as this suit is barred by the Doctrine of Sovereign Immunity and that the issues are nonjusticiable.

* * * *

[37] AFTER RECESS (12:02 p.m.)

THE DEPUTY MARSHAL: Remain seated and come to order.

THE COURT: You may proceed, counsel.

MR. WHITE: Thank you, Your Honor.

THE COURT: I may indicate that one troublesome question, I don't know whether it is troublesome or not, but one paramount question emerges from all I have heard this morning and also from the papers filed in this proceeding is whether or not you claim that the agency has unlimited and unbridled authority.

Mr. Lynch used the rather extravagant example that if you follow your argument to its conclusion, you could make a determination that all one-armed men with a cleft palate would be dismissed.

THE COURT: I want to know to what extent you claim the authority to do the sort of thing that he claims is done here without any statement of reasons.

MR. WHITE: The director is not asserting that he has what the Court has characterized as unlimited or unbridled authority.

The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally and the provisions of Title VII, for example, would apply [38] if there is a fair allegation of improper personnel practices discriminating against employees on the basis of race, for example.

The position of the Director is based upon the statute, is that his authority is very broad because the statute says that notwithstanding the provisions of any other law, the Director of Central Intelligence may in his discretion terminate an employee when he deems it advisable or necessary in the interests of the United States. And the cases that have reviewed this matter specifically, Baker and Pittman and the other cases that the Court referred to and that Mr. Lynch referred to have all held that the Director's authority is very broad. In one case it was described as plenary.

[50] THE COURT: Would you like to comment on this statement: "Defendant suggests that the interest of the [51] United States requires maximum secrecy about the CIA and that such secrecy could best be preserved by foreclosure of judicial review of agency personnel decisions, but neither the language nor the apparent intent of Section 403(3) suggests that Congress intended to protect the secrecy of the CIA at all costs or intended that the Director be the sole judge of the interests of the United States in all CIA personnel cases, even where the Constitution is implicated."

MR. WHITE: Your Honor, we make no assertion and the Director makes no assertion that the statute under which he acted in this case insulates him from the Constitution.

THE COURT: Well, you say that the plaintiff's constitutional argument is misplaced.

It doesn't rise to the level of a constitutional issue, is that it?

MR. WHITE: That is correct, Your Honor.

THE COURT: Did you know what I was reading from?

MR. WHITE: It sounded like the Jordan case, Your Honor, but I was not certain.

THE COURT: What do you think of Judge Oberdorfer's opinion?

You put it on the record, that is all right.

I won't share the transcript with him.

MR. WHITE: I think.

THE COURT: He will understand.

[52] MR. WHITE: I think basically there are two distinctions to be made. First is that in that case, as I understand it, the Agency was not arguing that there was no review if there was a substantial constitutional claim made; they were arguing that the plaintiff's act, which in that case was the publication of a telegram that he had sent back to headquarters, they were arguing that that act was not protected First Amendment activity.

And the second distinction to be made is obviously that in this case we don't have a First Amendment claim and as I stated, we don't have in this case subject matter which arises to a substantial constitutional claim.

Now I can see that there are possible problems attendant to that because the Court might ask, well, how do we know whether there is a substantial constitutional claim or not without looking into how the Director made his decision and, although that is a difficult question to answer, there are some circumstances which are analogous to that.

For example, in suits against federal officers the Courts, the Supreme Court recently held that in suits for personal damages against federal officers where there is a claim of constitutional violation, the Courts have held that

basically there has to be a pretty substantial claim made before the defendant would be required to answer, and in the case of Harlow against Fitzgerald, decided last term by the [53] Supreme Court made reference to the fact that unless the law was clearly established at the time the defendant acted, then there will be no discovery and the claim will be dismissed.

Basically, that is a little bit of a paraphrase, but the point is, Your Honor, really the presumptions of regularity and proper action must go in favor of the Agency because of the Agency's special concerns and because of the interests reflected in the statute and, therefore, the plaintiff at a minimum must come forward with substantial First Amendment claim or constitutional claim before the Court could begin to look at reviewing the circumstances.

Now in the absence of a concrete situation, I am not sure I could really address the issue any further. I would not know, for example, what position we would take if there had been a substantial First Amendment claim, and I suspect we would have several defenses—or I'm sorry I said First Amendment—but I meant constitutional in general.

THE COURT: The fact of the matter is we do not believe that there is substantial constitutional claim. He is labeled as a security risk; is that what he is labeled as?

MR. WHITE: Well, Your Honor, I would dispute that only in terms of how the label is applied. That is, I think we might have had a slightly different situation if a public disclosure were made so labeling him.

The circumstances here are that such a disclosure [54] would be made under special circumstances which have not arisen, and so no constitutional interest has at this point been affected, and in this case it would be the constitutional interest in liberty, as described by the plaintiff's papers.